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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA,

Appellees.

On Appeal from United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

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Jurisdictional Statement

Appellant Tar Asphalt Trucking Co., Inc., appeals from the judgment of the United States District Court for the District of New Jersey, entered on September 24, 1962, dismissing its complaint to set aside an order of the Interstate Commerce Commission, dated December 18, 1961, directing the revocation of the permits of plaintiff as a Con-

tract Carrier under the Interstate Commerce Act and in lieu thereof, directing that a Certificate of Convenience and Necessity be issued to it as a Common Carrier under said Act and to stay and enjoin the enforcement of the Commission order. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the United States District Court for the District of New Jersey is reported in 208 F. Supp. 611. A copy of the opinion is attached as Appendix A.

The report of the Interstate Commerce Commission is reported in 88 M.C.C. 443. A copy of the report is attached as Appendix B.

Jurisdiction

This suit was brought under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the United States District Court for the District of New Jersey was entered on September 24, 1962. Notice of Appeal was filed in that court by appellant on November 20, 1962. The jurisdiction to review the decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal, *American Trucking Associations, Inc.* v. *U. S.*, 364 U. S. 1; *Interstate Commerce Commission* v. *Jersey City*, 312 U. S. 503; *Schaffer Transportation Co.* v. *U. S.*, 355 U. S. 83.

Constitutional Provisions and Statutes Involved

Pertinent provisions of the Fifth Amendment to the United State Constitution, are set out in the appendix at page 24a.

Sections 203 (a) (15), 212 (c), 209 (b) and 203 (a) (14) of the Interstate Commerce Act (49 U. S. C. 303 (a) (15), 312 (c), 309 (b) and 303 (a) (14)), which are set out in the appendix at pages 19a to 23a.

Questions Presented

1. Was the lower court correct in holding that the 1957 amendment to the Interstate Commerce Act, contained in subsection (c), overruled the decision of the Supreme Court of the United States in the Contract Steel Carriers case, in view of the limitations placed upon Commission action by Sec. 209 (b) regarding existing carriers.

2. Was there substantial evidence in the record to support the Interstate Commerce Commission's report and order that the contract carrier permits of appellant-carrier be revoked and a certificate of convenience and necessity be issued in lieu thereof to appellant as a common carrier, and to support the Commission's findings a) that appellant's operations do not conform to the amended definition of a Contract Carrier; b) that appellant's operations are those of a Common Carrier.

3. Was there substantial evidence in the record to support the Commission's subordinate findings

a) that the same equipment was required for the transportation of the products of all of the customers of appellant

b) that the insulated equipment operated by the appellant was all equipped with heating units and pumps and extra long hoses to facilitate the unloading of asphalt;

c) that the evidence failed to disclose a separate distinct need of a particular customer for which appellant's equipment was peculiarly intended;

d) that appellant's equipment was designed for a type of product produced by a class of customers and not for the specialized requirements of a particular product of a single customer;

e) that the record failed to establish that any of appellant's customers had individual requirements relating to transportation of its product which was peculiar to its business and for which appellant provided a "tailor made" service to meet the individual customer's distinct need;

f) that appellant did not assign motor vehicles for a continuing period of time to each person served;

g) that appellant did not furnish transportation services designed to meet the distinct need of each individual shipper as required by the amended definition of a "contract carrier";

h) that appellant's witness testified that appellant will enter into a transportation contract with any shipper requesting such service provided agreeable terms for such service are arrived at;

i) that the appellant will serve the ordinary needs for transportation of any shipper of the commodities which it is equipped to handle within the area of operation.

4. Where should the burden of proof lie in a "conversion proceeding" under Sec. 212 (c) of the Intestate Commerce Act; with the carrier, who is a respondent or with the Commission who initiates the proceedings to change the carrier's status?

5. Was the Commission justified in holding as a matter of law, that appellant's contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a limited number of persons within the meaning of Section 203 (a) (15) of the Act, but must be regarded as a holding out of service within the meaning of 203 (a) (14) of the Act, when amending Section 209 (b) of the Interstate Commerce Act prohibits any limitations of numbers of contracts being included in the permits of an existing contract carrier and only authorizes Commission inquiry into the scope of additional operations, when additional contracts are added by an existing contract carrier?

6. Does the fact that the carrier may be acting for its own convenience in assigning vehicles for a continuing period of time to the exclusive use of shippers, rather than for the convenience of such shippers, without more, place such "exclusive use" operations outside the scope of the amended definition of a contract carrier, even though there is no qualifying limitation in the definition itself regarding convenience, and so justify the Commission in excluding such operations from further consideration in its determination of whether some of the carriers operations come within the amended definition of a contract carrier "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served"?

7. May the Commission, in revoking the permits of a contract carrier and issuing to it in lieu thereof a certificate of convenience and necessity as a common carrier in a conversion proceeding, impose restrictions in said newly issued certificate against tacking and joining separately stated grants of operating authority in order to furnish a through transportation service, even though tacking and joining are now permitted by the Commission to existing common carriers to provide a through transportation service, and thus

discriminate against common carriers, converted from contract carriers and in favor of existing common carriers?

8. May the holder of a regularly issued permit as a contract carrier under the "Grandfather clause of the Interstate Commerce Act, be converted against its will from a contract carrier into a common carrier certificate holder, by legislative redifinition or administrative interpretation, with the added burdens of common carrier status, if the evidence does not establish that the carrier's operations are those of a common carrier, in view of the prohibitions of the Fifth Amendment to the Constitution of the United States against the taking of private property for public use without just compensation and against the taking of private property without due process of law?

(b) Did the District Court err in failing to consider the Fifth Amendment issue though raised below by the pleadings and appellant's brief?

Statement of the Case

Plaintiff, Tar Asphalt Trucking Co., Inc., the holder of two permits as a Contract Carrier, issued to it under the "Grandfathers" clause following the adoption of the Motor Carriers Act, is and has been continuously since 1932 (prior to the effective date of the Act) engaged in hauling liquid asphaltic products and coal tar derivatives (mostly in tank trucks) under separate, continuing contracts with each individual customer. Following the amendment of the Act in 1957, amending the definition of a "Contract Carrier", the Commission, Division 1 thereof, on its own motion under Sec. 212 (c) of the Act, instituted a conversion proceeding on January 24, 1958 and hearing therein was held before a Commission Examiner on December 1, 1960 at Philadelphia, Pa. Evidence was adduced from the plaintiff's General Office Manager and its records and

copies of its separate contracts with shippers and by late filed exhibits. Judicial Notice was also taken by the Examiner of pertinent evidence in the Commission's own files.

The evidence adduced at the hearing indicated that the carrier, on August 22nd, 1957, and until the date of the hearing on December 1, 1960, has been engaged in furnishing transportation services under approximately 19 separate and continuing contracts to individual shippers in the cartage of liquid asphalt, road oils and other coal tar derivatives, in interstate commerce (mostly by tank truck) within the areas delineated in its permits; that it owns 7 tractors, 12 tank trailers, and 1 flat bed trailer; that it has leased as many as 6 tractors and 5 trailers, with drivers, for additional service in its operations; that its business was somewhat seasonal; in the spring and summer road construction periods its use of leased equipment was greater.

The evidence further indicated that this carrier, back in 1932, was the first in its field in this part of the United States to transport asphaltic products in tank trucks; rail tank car service was proving unsatisfactory for manufacturers because of freezing and solidifying of the asphaltic product in the tank cars during the winter months in the area; that the carriers equipment to handle this product year around was specially designed by the company and burners were applied to the tank equipment so as to keep the product in a liquified state from the pick up point at the refinery to the customer's place of business even during the winter months; that at the time there was no other motor carrier engaged in such an operation.

From the evidence it appeared that plaintiff-carrier's operations fall roughly into three categories; 1) transportation of asphaltic products, having varying characteris-

tics, for roofing, siding and shingle manufacturers; 2) transportation of road oils and asphalts to road builders; and 3) the transportation of diverse products for two particular customers, requiring the assignment of equipment to the exclusive use of each, for a continuing period of time.

Additional documentary evidence, requests for findings of fact and a short summation of the evidence adduced was also submitted by the plaintiff.

Following the conclusion of the hearing the Examiner filed his report and recommended order. Plaintiff filed exceptions thereto and a brief of argument in support thereof and requested oral argument thereon; the Commission, by Division 1 thereof, denied the request for oral argument and proceeded to its decision.

On June 13, 1961, the Commission (again by Division 1), rendered its decision by way of report and order and found that the operations of plaintiff were those of a common carrier by motor vehicle and not those of a "Contract Carrier", under the new definition of a Contract Carrier set out in the 1957 amendment to the Act; that the permits of plaintiff as a contract carrier by motor vehicle should be revoked and in lieu thereof a certificate should be issued to plaintiff as a common carrier by motor vehicle of the same commodities and from and to the points or territories authorized in the previously held permits of plaintiff as a contract carrier, upon compliance by plaintiff with the requirements of Sections 215, 217 and 221 (c) of the Interstate Commerce Act within 150 days of the date of service of said order of the Commission, dated June 13, 1961.

Conceiving that the said report denied to plaintiff the continuing status of a contract carrier to which it was entitled under the previous definition of a contract carrier and to which it holds it is still entitled under the amended

definition in the Act of a contract carrier, and that the order of the Commission, implementing its report, would require the plaintiff to comply with Sections 215, 217 and 221 (c) of the Act (furnish cargo insurance, file printed tariffs and a new designation of an agent for the service of process) within 150 days of its service, and that on failure to comply, plaintiff's permits as a contract carrier would be revoked and that it would then be out of business, plaintiff thereupon filed its original complaint in the United States District Court for the District of New Jersey on August 16, 1961, asserting generally the foregoing facts and alleging numerous deficiencies in the Commission's conclusions, findings and report and sought by its complaint to have the said order of the Commission set aside and its enforcement stayed and enjoined.

Following the service of the complaint and while the action was pending, the Commission, on its own motion, reopened the proceedings for reconsideration of the existing record.

Following reconsideration the Commission rendered its decision, by way of report and order, and found that its previous report was deficient in that it had failed to make certain specific findings, required by Sec. 212 (c) of the Act. In its said report it made specific findings that the operations of the plaintiff did not and do not conform to the amended definition of a contract carrier; that they are the operations of a common carrier; that they are otherwise lawful.

Generally, in all other respects, the findings and conclusions contained in the report of June 13, 1961 were affirmed; particularly that the permits of the plaintiff, as a contract carrier, should be revoked and in lieu thereof a certificate of convenience and necessity should be issued to the plaintiff as a common carrier for the same points

and commodities but providing that there be no tacking or joining of authorities to provide a through transportation service. It was further provided by both the report and order that the certificate as a common carrier was only to be issued to plaintiff if it had complied with Sections 215, 217 and 221 (c) within 150 days of the order, and if plaintiff had failed to comply within said time, plaintiff's permits as a contract carrier would be revoked (even though no certificate as a common carrier had issued).

Plaintiff, on January 22, 1962, filed an amended complaint, reciting generally the foregoing facts and again alleging numerous deficiencies in the Commission's conclusions, findings and report of December 18, 1961, and praying that the implementing order of the Commission, also dated December 18, 1961, be stayed, enjoined and set aside.

The Commission and the United States answered the amended complaint by a joint answer and admitted generally all of the facts alleged in the amended complaint but denied the claimed status of the plaintiff as a contract carrier and they denied all of the alleged deficiencies of the Commission in reaching its findings and conclusions and in issuing its report and order.

Upon the filing of the joint answer of the defendants, a three-judge statutory court was convened and, on the record before the Commission, and the pleadings, briefs and oral arguments of the parties, heard the case on May 9, 1962. On September 12, 1962, the Court filed its opinion sustaining the Commission's report and order finding there was substantial evidence in the record in support thereof. An appropriate order dismissing plaintiff's complaint was entered on September 24, 1962. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the District of New Jersey on November 20, 1962.

The Federal Questions are Substantial

This is the first case of appellate consideration of the Interstate Commerce Commission's interpretation of the 1957 amending definition of a contract carrier by motor vehicle under the Interstate Commerce Act and of the scope and nature of a "conversion proceeding" under amending section 212 (c) of said act and of the limitations placed upon the Commission against limiting the numbers of contracts held by an existing contract carrier, by amended section 209 (b) of the Act and the effect of said limitations.

Serious problems of construction, interpretation and administration under these amendments to the act are presented, affecting all permit holding contract carriers, not yet converted to common carriers under 212 (c) of the Act. Not only are the questions important to this carrier-appellant, they are important to all contract carriers, "converted", unconverted and yet to be converted. Their resolution would act as a guide to the Commission in further administering the act and would pass upon the interpretations that have been given by the Commission to the terms employed in the amended definition of a contract carrier, *viz.*: "through the assignment of vehicles for a continuing period of time to the exclusive use of each person served"; "contracts with a limited number of persons"; "transportation services designed to meet the distinct need of each individual customer".

Their resolution would serve to clarify to carrier and shipper alike the meanings to be accorded to these terms in the future.

A

The opinion of the lower court held that the 1957 Amendment to the Interstate Commerce Act, contained in Sub-

section (c), overruled the decision of the Supreme Court of the United States in the *Contract Steel Carriers* case (350 U. S. 409).

In view of the limitations placed upon Commission action by the proviso in Section 209 (b) of the Act against any limitations in the carrier's permits of the number of contracts an existing carrier could add, the question is presented whether the lower court was correct in holding that the 1957 Amendment overruled this Court's decision in the *Contract Steel Carriers* case or whether the decision is still the law as far as contract carriers existing on the effective date of the 1957 act are concerned.

B

While this Court is not lightly to undertake a consideration of the whole record to determine if there is substantial evidence in the record to support the Commission's findings and particularly when the court below has so held, when the only evidence in the case is that adduced by the appellant and that evidence is uncontroverted in any respect and it is strenuously suggested that the evidence not only does not substantially support the Commission's findings but calls for a contrary conclusion, this Court may, in the exercise of its discretion, review the record to reach its own determination of that question.

a.

The evidence in this case showed the assignment of two vehicles for a continuing period of time to the exclusive use of two shippers. Because the Commission found that these assignments were for the convenience of the carrier, it refused to consider the operations as meeting the statutory test.

b.

The evidence further showed the furnishing of transportation service designed to meet the distinct need of each individual customer.

It shows that appellant company, about 1932, commenced the trucking of liquified asphalt products in tank trucks, specially designed by the company for that purpose, and equipped with "burners" to keep the product in a liquified state throughout the year, including the winter months; that such operations, as far as the officers knew, was the first of its kind in the eastern part of the United States.

As time went on, to meet the special needs of its customers appellant developed different types of specialized equipment such as insulated tank trucks, and later, insulated tank trailers; trucks, and later tractors, with built-in pumping equipment to discharge cargo of high density used by customers in their business; auxiliary portable burners to maintain constant temperature of product during transportation. Each were developed to meet a distinct and different need of a particular shipper at the time because of the difference in type of product than that transported for other shippers.

In addition to the development of additional and different types of equipment to meet the distinct needs of its customers, as time went on it also developed and furnished service "to meet the distinct need" of each customer; needs distinct because of the particular type of product carried, because of the type of customer's job operations, such as road construction, because of the peculiar nature of some consignee's facilities, such as distance of receptacle from highway; because of the need for pick-up and delivery at specified times; By the time of the effective date of the amended definition (August 22, 1957), plaintiff was furnishing different types of equipment to carry the differ-

ent types of products of each customer, including different types of equipment for asphalt used in paint manufacturing and for asphalt used in shingle manufacturing; it was furnishing a long hose and pump for one particular shipper; it was providing a barrelling and weighing service on delivery for another particular shipper; it was having a piece of its equipment at a refinery at a specified time to take on a load of a special product and to discharge the load at a specified time at the plant of the customer, maintaining a fixed high temperature throughout the trip because of the customer's special need; it was furnishing delivery of asphalt and road oils daily to progressing sites of delivery during the progress of road construction for different road construction contractors; it was supplying drivers experienced with the inherent qualities and characteristics of the different types of products being transported for each of the customers served.

All of this is present in the record and it adds up to "transportation services, designed to meet the distinct need of each individual customer."

Each of the appellant's customers has a distinct need to have asphalt or asphaltic products delivered to him in a liquid state throughout the year, including the winter months; in addition, one customer needs his kind of asphalt delivered to him in an insulated tank, the next does not; one customer needs his kind of asphalt discharged by pump because of the high density of the type he uses, the other does not; one needs the temperature maintained on his kind of asphalt throughout the shipment, the next does not; one needs pick-up and discharge of his kind of asphalt to be at specific hours, others do not; one needs special equipment provided for him to discharge his product into his receptacles because of their distance from the road, the others do not; three need delivery of the product to progressively

advancing points of delivery as road construction moves forward, the remainder do not; Each and all of them need experienced handlers of the varying products with knowledge of the different characteristics of each product. These things are not offered by common carriers; they are not in a position to offer them.

While it is true that each individual customer must have a "distinct need" of services designed to meet that need, the fact that two or more customers of appellant have the same "distinct need" does not change the result. The definition requires that the service must be designed to meet the distinct need of each customer, not that the customer's needs must be distinct from the needs of all other customers of the carrier. The Commission recognized this in the case of *Armored Motor Service Co. Inc., Conversion Proceeding*, 77 M.C.C. 433 (1958), in which contract carrier status was sought by the carrier, an armored car service to banks and where the Commission held that the applicant provided a tailor made service for particular customers under individual contracts and was a contract carrier, in that all of the customers had a need for (police protection to safeguard the commodities entrusted to their care) in transporting their valuables, but in addition each had individual requirements relating to the transportation of the considered commodities, which were peculiar to its business and the applicants conducted their operations in a manner calculated to satisfy such demands.

In the case of *Craig Contract Carrier Application*, 31 M. C. C. 705 (1941), the Commission, at pg. 711, amongst other things held that the specialization it had in mind might consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of em-

ployees in the proper handling of particular commodities or the supplying of related non-transportation services such as the assembling, placing or servicing of machinery.

The evidence here does not lend substantial support to the Commission's findings that plaintiff's operations do not conform to the amended definition of a contract carrier or its subordinate findings in its report that the appellant does not furnish transportation services designed to meet the distinct need of each individual shipper.

c.

The evidence in the record did not substantially support the Commission's finding that appellant's operations have been and were those of a common carrier by motor vehicle and its subordinate findings that the appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority. The evidence discloses this, that on any inquiry from a prospective customer, the office manager of the appellant asks the shipper some of the key questions—the estimated quantity for a year or years they may want the service—whether the service will be constant, by the day, by the week, by the month—whether it is seasonal and any other important particular; following which the president goes over to the shipper or discusses the matter by phone and the president decides whether the shipper is accepted or not; if they come to an agreement the president directs the office manager to type up a contract, which is sent to the shipper for signature.

This is a far cry from "convincing evidence" that the carrier is holding itself out to the general public.

If there are any doubts on the subject they are resolved for us by a reference to the report of the Commission, (Appendix B) and the statement therein that "from

August 22, 1957 until December 1, 1960 (the date of the hearing before the Examiner) appellant carrier had but 19 effective continuing contracts with shippers."

This means that in a period of three years, the critical three years under review, the carrier did not acquire even one new effective contract.

But the Commission further found that appellant's contracts with 19 individual shippers could not be regarded as contracts with a limited number of persons within the meaning of 203 (a) (15) but must be regarded as a holding out within the meaning of 203 (a) (14). As will be separately developed later, the Commission was not justified in considering the number of contracts held by an existing contract carrier in determining if they were contracts with a limited number of persons.

It is on this evidence and on the conclusion that 19 contracts amount to a holding out under 203 (a) (14) of the act that the Commission concludes that appellant's operations have been and were those of a common carrier by motor vehicle.

This is less than substantial evidence in the record to support such findings and the subordinate findings that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority.

C

A conversion proceeding brought under Sec. 212 (c) is essentially an adversary proceeding. The Commission is empowered but not directed to initiate a proceeding after notice and hearing, and revoke a permit if it finds that the operations of any person on the day the subsection takes effect, do not conform with the definition of a con-

tract carrier in section 203 (a) (15). The carrier is a respondent in such a proceeding. Where should lie the burden of proof? This question has not yet been considered by an appellate court. In application proceedings under Sec. 209 (b) for a permit or under 206 (b) for a Certificate of Convenience and Necessity the burden of proof is always on the applicant, the initiator of the proceeding. But here there is no applicant, the initiator is the Commission. Must the respondent again prove his continuing right to the permit?

The amendments to the act do not treat of this. It is a procedural step in the administration of the act that needs clarification for the better administration of the act. The Commission, in the Court below, took the position that the point was waived because not raised. The court below seemed to hold that the statutory power reposed in the Commission by 49 U. S. C. 305 (d) (to compel attendance of witnesses etc.) would have enabled the Commission to reach the same conclusion if appellant had not presented its witnesses and exhibits before the Examiner. The court's holding left unresolved the fundamental question, "Who had the obligation to establish by a preponderance of the evidence that appellant was a contract carrier within the amended definition of the act: that appellant was not a common carrier?" A substantial question of procedure in conversion cases is thus raised.

D

In reaching its ultimate conclusion that the appellants services are and have been those of a common carrier, the commission arrived at a subordinate finding that appellants "contracts with 19 individual shippers, some of whom were competitors, cannot be regarded as contracts with a limited number of persons within the meaning of

203 (a) (15) of the act but must be regarded as a holding out of service within the meaning of 203 (a) (14)".

In this, the Commission is attempting to apply a criterion struck down by this Court's decision in the *Contract Steel Carriers* case (350 U. S. 409) and which the Commission sought to have reestablished by Congress, following that decision. In connection with existing contract carriers (as distinguished from future contract carriers) Congress refused to permit the Commission to impose a numerical limitation. Its Senate Interstate and Foreign Commerce Committee added to the proposed bill submitted by the Interstate Commerce Commission, its own section 209 (b) of the act which provided,

> "* * * That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this provision which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless * * * the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier * * *."

As so added, the bill was adopted by Congress.

By specifically inserting this provisio Congress made its intention clear that there were to be no numerical limitations on the contracts held or to be held by existing contract carriers as distinguished from future contract carriers.

In reaching its conclusion that appellants "contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a limited number of persons within the meaning of Section 203 (a) (15)," the commission is giving consideration to the "number"

of contracts held, when this appears contrary to the clearly expressed intention of Congress, when it amended the act and added to the bill the proviso against limitations on numbers of contracts being imposed in the permits of existing contract carriers.

Is this Commission's finding contrary the intent of Congress, particularly when the record indicates and the Commission's report found that in the three critical years from August 22, 1957 to December 1, 1960, the carrier had added not one contract; that during all that period it was operating under 19 effective contracts?

E

The evidence in the record indicated that appellant was assigning vehicles for a continuing period of time to the exclusive use of two of carrier's shippers. The Commission, in its report, found that they were apparently set aside for the convenience of the carrier and then gave no further consideration to this "exclusive use" operation in reaching a determination whether appellant's operations were those of a contract carrier "through assigning vehicles for a continuing period of time to the exclusive use of each person served." The District Court likewise was of the opinion that since the setting aside of these vehicles was for the convenience of the carrier, that they did not constitute the setting aside of vehicles for the exclusive service of a particular shipper.

There is no qualifying limitation in the amended definition concerning the assignment of vehicles to the exclusive use of each person served based upon for whose convenience the vehicles are assigned, the shipper or carrier. The pertinent words of the amended definition are

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor

> vehicle * * * under continuing contracts * * * either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served.

It thus appears that the Commission is attempting to add a qualifying condition to the definition. A substantial question is presented whether the Commission in determining if a carrier meets the amended definition of a contract carrier may add additional conditions to those already laid down by Congress in the definition enacted by it.

F

In its report and order of December 18, 1961, the Commission, after directing that the appellant's contract carrier permits be revoked and a certificate of convenience and necessity be issued to it as a common carrier, further directed that there be no tacking and joining of separately granted authority to provide a through transportation service by appellant. At that time tacking and joining of separately stated grants of authority were permitted to existing common carriers. When Congress amended the definition of a contract carrier (Sec. 203 (a) (15)), it did not amend the definition of a common carrier as it appears in 203 (a) (14). Congress was familiar with tacking and joining by common carriers and it appeared satisfied to let the existing circumstance to continue. If it wished to have limited the converted common carrier from tacking and joining it could have done so in the amendments adopted or by amending Sec. 203 (a) (14). It did neither.

The effect of the Commission's action in this matter in denying tacking and joining to the converted common carrier, while allowing tacking and joining to existing common carriers, is to create in the future two classes of

common carriers and to discriminate between them. This seems to be at variance with the Congressional intent in amending the contract carrier definition while retaining the existing common carrier definition.

As the common carrier definition stands now (and as it stood before the 1957 amendment of the definition of a contract carrier) it appears to provide for only one all inclusive class. The action of the Commission in denying tacking and joining to the converted common carrier while allowing it to the existing common carriers will be to create two classes of common carriers, each with the same responsibilities but one enjoying privileges denied to the other. That the result of such action will have the effect outlined is supported by the dissenting opinion of Commissioner, McPherson in the *Conversion Proceeding, T. T. Brooks Trucking Co., Inc.*, 81 M. C. C. at 580.

As he there points out, Congress was familiar with the long standing policy of generally permitting tacking of common carrier authority; if it wished to limit the converted carrier it could have done so in the amendment.

The Commission has urged the concept of "substantial parity of operations" as justifying its refusal to allow tacking and joining to converted common carriers and has cited its opinion in the *T. T. Brooks* case (*supra*) as outlining its reasons. While the concept of "substantial parity of operations" had its proper place in the consideration of the extent of the authority to be granted under an original "Grandfather Clause" applications for permits, in order to achieve substantial parity among the applying contract carriers, the concept has no proper application in limiting the rights of converted common carriers to less than those enjoyed by existing common carriers with whom the converted carrier must compete now for the first time. This limitation does not serve the con-

cept of parity between the two kinds of common carriers as its earlier application did among all contract carriers. It handicaps one and benefits the other. Nor is the National Transportation Policy served by denying a through transportation service to the public by one class of common carriers while permitting it to the other. The only beneficiaries of such a limitation are the existing common carriers. A substantial federal question of discrimination between carriers under the Act appears to be presented.

G

It was urged upon the lower Court by the pleadings and appellant's brief that if the evidence did not establish that the carriers operations were those of a common carrier, appellant, as a contract carrier could not be converted into a common carrier against its will by legislative redefinition or administrative interpretation thereunder, in view of the Fifth Amendment prohibitions against the taking of private property for public use without just compensation and against the taking of private property without due process of law.

Under the decision in *Michigan Commission* v. *Duke*, 266 U. S. 570, 578 (1925) it was held that it was beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier, into a public utility or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment.

It has also been held that the limitations on the power of Congress or the Federal government imposed by the Fifth Amendment against taking private property for public use without just compensation are the same as

those imposed on the states by the Fourteenth Amendment. *California Water & Telephone Co.* v. *Railroad Commission of California* D. C. Cal. 1937 19, F. Supp. 11.

The lower Court considered whether there was a Fourteenth Amendment question and held there was not; it did not reach or pass upon the Fifth Amendment question.

CONCLUSION

Appellant respectfully suggest that this appeal brings before this Court federal questions that are important and whose implications are nation-wide, equally in terms of legal principles, administrative procedures and in their impact upon contract carriers, whether converted, unconverted or yet to be converted, and upon the shipping public who use the contract carrier service; that a proper showing has been made to indicate that the questions are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

JOHN J. CORCORAN, JR.
Counsel for Appellant

APPENDIX A

Opinion of the United States District Court, District of New Jersey

(Filed September 12, 1962)

By WORTENDYKE, D. J.:

This action is brought to set aside the report and order of the Interstate Commerce Commission (Commission) entered December 18, 1961 in Docket No. MC-93207 (Sub No. 99), Tar Asphalt Trucking Company, Inc., Conversion Proceeding. This Court's jurisdiction is derived from 28 U. S. C. §1336, and was exercised as a Three-Judge Court pursuant to sections 2284 and 2321-2325 of that Title.

Prior to the institution of the Proceedings by the Commission on January 24, 1958, Tar Asphalt Trucking Company, Inc., hereinafter referred to as Tar Asphalt, had been operating as a contract carrier by motor vehicle, under 10 C permits dated respectively September 13, 1946 and March 30, 1948, for the transportation of coal tar, coal tar distillates and residue, asphalt and asphaltic admixtures in bulk, in tank trucks. The Conversion Proceedings were instituted by the Commission pursuant to the provisions of 49 U. S. C. §312(e). That statutory subdivision directed the Commission to examine each outstanding permit issued to a motor carrier, and authorized the Commission to institute, within 180 days after August 22, 1957, a proceeding upon its own initiative to revoke a permit and to issue in lieu thereof a certificate of public convenience and necessity if it found that the operations of the permit holder on that date did not conform with the definition of a contract carrier contained in 49 U. S. C. §303(a)(15); but were those of a common carrier, and were otherwise lawful. That statutory

definition of "contract carrier by motor vehicle" is "any person which engages in transportation by motor vehicle of * * * property in interstate * * * commerce, for compensation (other than transportation referred to in paragraph (14)[1] of this section and the exception therein), under continuing contracts with one person of a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Protests against the conversion of Tar Asphalt from a contract carrier to a common carrier were filed by five motor vehicle carriers, but at the hearing before the Commission's Examiner, on December 1, 1960, no testimony in behalf of the protestants was offered, and only one witness testified in behalf of Tar Asphalt.

The Commission's Examiner found that Tar Asphalt's operations on August 22, 1957 did not conform to the statutory definition of contract carrier, but were those of a common carrier by motor vehicle, although otherwise lawful. He accordingly recommended that an appropriate certificate issue to Tar Asphalt to operate as a common carrier by motor vehicle and that its permits to operate as a contract carrier be revoked. Tar Asphalt filed exceptions to the Examiner's recommended order. Upon due consideration, Division 1 of the Commission, by its order of June 13, 1961, directed that certificate of public convenience and necessity issue to Tar Asphalt, authorizing its operation as a common carrier by motor vehicle for the transportation of the com-

[1] Subsection (14) defines a common carrier by motor vehicle.

modities, to and from the points, and within the territories authorized by its permits as a contract carrier, upon its compliance with the requirements of the Act. The period within which Tar Asphalt was directed by the Commission's order of June 13, 1961 to comply with the statutory prerequisites for the issuance of a certificate as a common carrier, was extended for a period of 60 days, by order of October 10, 1961. The Conversion Proceedings were reopened by order of November 8, 1961, of Division 1 of the Commission, whose further order of December 18, 1961[2] also adopted the Examiner's findings and those of its previous order, and again concluded, after reconsideration, that Tar Asphalt's operations did not conform to the definition of a contract carrier, but were those of a common carrier by motor vehicle, and were otherwise lawful.

Upon the oral argument before this Court, on May 9, 1962, it appeared that the record before the Commission had not been filed by Tar Asphalt, and the defendants urged that the Court dismiss the action for that reason; citing *Mississippi Valley Barge Line Co.* v. *United States* 1934, 292 U. S. 282, 286. The plaintiff filed the record within the prescribed period following the completion of the oral argument, pursuant to leave granted by the Court.

Upon consideration of the testimony and exhibits given and admitted before the Commission's Examiner, we conclude that the Commission's order, here presented for review, was supported by substantial evidence. The evidence adequately sustains the inferences that (1) Tar Asphalt's operations do not conform with the definition of a contract

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[2] The complaint in the case before this Court was filed August 15, 1961; but, following the Commission's order after reconsideration, an amended complaint was filed herein on January 22, 1962. Defendants answered the amended complaint on February 9, 1962.

carrier in section 303(a)(15) of the Act; (2) its operations are actually those of a common carrier; and (3) its operations are otherwise lawful. In order to conform with the statutory definition of a contract carrier, the carrier must operate "under continuing contract with one person or a limited number of persons" (1) for the furnishing of transporation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (2) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

That the Commission's interpretation of section 212(c) of the Act accords with the congressional intent in its enactment in 1957 will appear from a perusnal of the legislative history set forth in 1957 U. S. Code Cong. & Admin. News, at page 1604. The Senate Committee on Interstate and Foreign Commerce, to whom the bill to revise the definition of contract carrier by motor vehicle was referred concluded that the then present law (49 U. S. C. 303(a)(15)) was "inadequate in some respects and that corrective legislation * * * (was) necessary. * * * The decision of the Supreme Court in United States v. Contract Steel Carriers points out clearly a need for a change in the statute. Without it, proper and sound administration and regulation in the public interest cannot be achieved." In Contract Steel Carriers (1956, 350 U. S. 409) the Court concluded (p. 416) that the carrier was a contract carrier because it "hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area;" and that its active solicitation of business "within the bounds of his license does not support a finding that it was 'holding itself out to the general public'." The opinion adds that a "contract carrier is free to aggressively

search for new business within the limits of his license." The 1957 amendment of the Act contained in the new subsection (c) overruled Contract Steel Carriers, by enunciating different criteria for determining whether a motor carrier is operating as a "contract," as distinguished from a "common" carrier.

A General Office Manager and Internal Accountant of Tar Asphalt testified before the Examiner that, since August 22, 1957, Tar Asphalt had at least 50 contracts pertaining to the transportation of asphalt or asphalt products of one kind or another. These contracts are normally for one year, but with a proviso that they shall continue unless cancelled by either party within a limited time after the expiration of the year. A list of 19 of these contracts, together with two invoices of Tar Asphalt for haulage in behalf of two of the parties with whom it had contracts, were admitted as late-filed exhibits after the conclusion of the hearing before the Examiner. Plaintiff does not assign vehicles for a continuing period of time for the exclusive use of each person with whom it contracts to furnish transportation. The carrier's equipment is allocated as orders come in, and then only for the period of the particular order or job. To this practice there were two possible exceptions, which were made for the convenience of the carrier, rather than for that of the shipper. An example of these exceptional instances is found in endeavor to keep one tank for the transportation of oxidized asphalt in order to relieve the carrier of the necessity of cleaning the tank of residue of the product before using it for a different product. The exceptions referred to did not constitute a setting aside of vehicles for the exclusive service of a particular shipper (as distinguished from a particular product). The evidence further disclosed that although the plaintiff operated some equipment which was insulated and equipped with heating

units and pumps, with extra long hoses to facilitate the unloading of liquid asphalt such equipment was required by the nature of the commodities transported by the plaintiff, as distinguished from the distinct need of a particular shipper. Since all of the plaintiff's customers dealt in products having generally similar characteristics, the same equipment was required for the transportation of the products of all of the customers of the plaintiff and of any others in the same production field whom it might secure. The evidence failed to disclose a separate distinct need of a particular customer for which plaintiff's equipment was peculiarly intended. Plaintiff's equipment was designed for a type of product produced by a class of customers and not for the special requirements of a particular product of a single customer. The record before the Commission failed to establish that any of plaintiff's customers had individual requirements relating to the transportation of its product which were peculiar to its business and for which the plaintiff provided a "tailormade" service to meet the individual customer's distinct needs. That plaintiff's equipment was peculiarly essential for the type of product which it transported does not negate its status as a common, as distinguished from a contract, carrier, since its specialized service may be held out to all members of the public who have occasion to ship products for which such specialized equipment is appropriate. Therefore, the Commission properly concluded that Tar Asphalt did not assign motor vehicles for a continuing period of time to the exclusive use of each of its customers, nor did it furnish transportation services designed to meet "the distinct need of each individual customer" as required by the definition of "contract carrier by motor vehicle" contained in 49 U.S.C. §303(a)(15).

Appendix A

Although plaintiff (at the time of the hearing before the Commission's Examiner) enjoyed only 19 continuing contracts with different customers, those contracts were for the transportation of a "narrow" group of related commodities consisting basically of asphalt and related petroleum products in bulk. However, plaintiff's witness testified that Tar Asphalt will enter into a transportation contract with any shipper requesting such service, provided agreeable terms for such service are arrived at. There was, therefore, substantial evidence justifying the Commission in concluding that the plaintiff will serve the ordinary needs for transportation of any shipper, of the commodities which it is equipped to handle, within its area of operations.

The plaintiff does not challenge the Commission's finding that Tar Asphalt's operations "are otherwise lawful," which is required by 49 U.S.C. §312(c) as the third prerequisite for authorization to operate as a common carrier of the products which the plaintiff handles. Plaintiff, however, contends that the proviso in the Commission's order, "that separately stated grants of operating authority shall not be joined or tacked directly one to another in order to provide a through transportation service * * *," is erroneous. The purpose of the limitation contained in that proviso is obviously to maintain substantial parity with the operating authority contained in Tar Asphalt's contract carrier permits, and is in accord with the legislative intent implicit in section 312(c) of the Act which provides for "the transportation, as a common carrier, of the same commodity between the same points or within the same territory as authorized in the permit" (for contract carriage). See *Crescent Express Lines, Inc.* v. *United States*, 1943, 320 U. S. 401. The contemporaneous construction of the Act by the Commission in this regard, as set forth in

its decision in *T. T. Brooks Trucking Co., Inc.*, Conversion Application 81 MCC 561 (1959) is entitled to great weight. *United States* v. *American Trucking Associations*, 1940, 310 U. S. 534. We accept it as a well reasoned authority.

We find to be without merit Tar Asphalt's further contention that the Commission's attempt to convert its status from that of contract carrier to that of common carrier, against the plaintiff's will amounts to a taking of private property for public use without just compensation and without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. The Act does not authorize, and the Commission's order does not effect, a conversion of the plaintiff from a private carrier to a public utility. The statute does not *require* that Tar Asphalt operate as a common carrier, it merely affords an opportunity to plaintiff to continue to operate as a *common* carrier within the territory and for the purposes which it had formerly authorized by its previously issued permits. The statute merely embodies a new definition of a "contract carrier" and authorizes the Commission to determine whether one holding a permit as a contract carrier comes within that definition. The evidence before the Examiner amply sustained the Commission's conclusion that the plaintiff's operations did not bring it within the statutory definition. In this connection, plaintiff's argument that the burden of proving that it was not a contract carrier was cast upon the Commission, and required the presentation of proof by the Commission, indicates a misconception on the part of the plaintiff of the meaning and effect of section 312(e). The Commission is the administrative body to which Congress had delegated the exercise of its congressional authority in the field of interstate commerce. The Act imposes numerous inquisitorial, regulatory and supervisory duties upon the Commission in the discharge

of its statutorily authorized powers and responsibilities. Assuming, without so deciding, that plaintiff has preserved its right to contend that the burden of proof rested upon the Commission and not upon it, the statutory power reposed in the Commission by 49 U.S.C. 305(d) would have enabled the Commission to reach the same conclusion if plaintiff had not presented its witness and exhibits before the Examiner.

This Court may not set aside an order of the Commission which is within the scope of the Commission's statutory authority and based upon adequate findings supported by substantial evidence. *United States* v. *Pierce Auto. Freight Lines*, 1946, 327 U. S. 515. Where, as here, the applicable statutory language has been construed by the Commission in the light of its legislative history, such construction commands greater respect than that usually accorded administrative determinations of questions of law. *United States* v. *American Trucking Associations, supra.*

The order of the Commission is affirmed, and an appropriate order may be presented.

APPENDIX B

Report of the Interstate Commerce Commission

No. MC-93207 (Sub-No. 9)

TAR ASPHALT TRUCKING COMPANY, INC.,
CONVERSION PROCEEDING

Decided December 18, 1961

On reconsideration, findings in prior report, M. C. C., decided June 13, 1961, affirmed. Operations of respondent found to be those of a common carrier by motor vehicle, and respondent found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle of the commodities and from and to the points or territories authorized by its presently-held permits. Issuance of a certificate in lieu of presently-held permits authorized upon compliance by respondent with certain conditions.

Appearance as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

Division 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

WEBB, COMMISSIONER:

By order of January 24, 1958, Division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to determine whether outstanding permits of Tar Asphalt Trucking Company, Inc., of Jersey City, N. J., authorizing the operations described in the appendix hereto, should be revoked and a certificate

of public convenience and necessity issued in lieu thereof.

In the prior report herein, decided June 13, 1961, we concluded that respondent's operations do not conform with the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act. The prior report, however, failed to make certain specific findings, as required by section 212(c) of the act. By order of November 8, 1961, we reopened the proceeding on our own motion to correct those deficiencies. We adopt as our own the statement of facts in the report of the examiner and in our prior report. Only those facts necessary for clarity of discussion will be restated herein.

On and since August 22, 1957, respondent has been transporting liquid asphalt, road oils, and other coal tar derivatives under 19 effective continuing contracts with individual shippers. It owns 7 tractors, 12 tank trailers, and 1 flatbed trailer and leases as many as 6 tractors and 5 trailers for use during the peak spring and summer road construction periods. Respondent's tank trailers are insulated and are equipped with heating units and pumps with extra long hoses to facilitate the unloading of liquid asphalt. For the most part, respondent does not dedicate equipment to the exclusive use of any particular shipper. It set aside equipment, however, for the exclusive use of two shippers during the periods that orders were being received from those shippers for the transportation of particular commodities. In the case of one shipper, a tank trailer was set aside for a continuing period to transport oxidized asphalt. This was done to avoid the necessity of cleaning the tank after every shipment. A tank trailer with auxiliary burner equipment was set aside for the use of another shipper for a continuing period because the commodity had to be transported at a high temperature.

Appendix B

As of August 22, 1937, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein) under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

At the same time section 212(c) was added to the act. It provides in part as follows:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either on its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. * * *

Appendix B.

In testing respondent's above-described operations by the criteria set forth above, it fairly appears that they do not conform to the definition of a contract carrier, and that they are the operations of a common carrier and are otherwise lawful. With the possible exception of two tank trailers which apparently were set aside for the convenience of respondent, it does not dedicate vehicles for a continuing period time for the exclusive use of each person served. Although respondent claims that it is providing a specialized service for its customers, the evidence of record fails to establish that it furnishes a transportation service designed to meet the distinct need of each individual customer. The use of heating units and pumps with extra long hoses is not indicative of a distinctive or specialized service.

Having determined that respondent's operations do not conform to the definition of contract carrier, we must now consider whether its operations are those of a common carrier. Section 203(a)(14) of the act reads in pertinent part as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes. * * *

The determination hinges here on whether respondent serves a limited number of persons or holds itself out to serve the general public. We think the evidence is convincing that, despite its practice of operating only under contracts, the respondent holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority. As

pointed out by the Commission, Division 1, in *Armored Motor Service Co., Inc., Conversion Proceeding*, 77 M. C. C. 433, the number of contracts negotiated with shippers does not determine conclusively the carrier's status. Among the factors to be considered in section 212(c) proceedings in conjunction with the number of outstanding contracts are the different types of commodities transported, the territory in which operations are conducted, the degree of specialization required by the nature of the business of the shippers involved, and the degree of similarity in the services the carrier performs under its effective and continuing contracts. *Storch Trucking Co., Inc., Conversion Proceeding*, 82 M. C. C. 777. Weighing all of these factors, we conclude, as did the examiner, that the respondent's services are not intrinsically different from those of common carriers. Under these circumstances, respondent's contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a "limited number of persons" within the meaning of section 203(a)(15) of the act, but must be regarded as a holding out of service to the general public within the meaning of section 203(a)(14). Accordingly, we find that the respondent's operations are and have been those of a common carrier by motor vehicle.

There is no question that respondent's operations are "otherwise lawful" within the meaning of section 212(c). Respondent has confined its operations to the scope of its authority, and in all other respects appears to be in compliance with the Commission's rules and regulations.

Upon reconsideration, we find that the operations of respondent on August 22, 1957, did not and presently do not conform to the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act, as amended; that such operations are those of a common carrier by motor vehicle and are otherwise lawful; that by

reason thereof respondent is entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, in interstate or foreign commerce, of the commodities, from, to, and between the points described in the appendix hereto, provided however, that separately stated grants of operating authority shall not be joined or tacked directly or indirectly one to another in order to provide a through transportation service, nor shall duplicative authority contained in the certificate to be issued be construed as authorizing more than a single operating right; and that an appropriate certificate authorizing such operations should be granted concurrently with the revocation of the permits now held by respondent as described in the appendix hereto.

Upon compliance by respondent with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder, within the time provided in the order entered concurrently herein, an appropriate certificate will be issued.

An order will be entered requiring respondent to comply within the time specified therein with sections 215, 217, and 221(c) of the act, and requiring further that, should respondent fail to effect such compliance, its outstanding permits shall be revoked within a specified time. *Storch Trucking Co., Inc., Conversion Proceeding, supra.*

APPENDIX

No. MC-93207, dated September 13, 1946.

Coal-Tar, coal tar distillates and residue, asphalt and asphaltic admixtures in bulk, over irregular routes.

From Philadelphia, Pa., and points within 10 miles of Philadelphia, and those in Hudson, Union, Somerset,

Middlesex, and Bergen Counties, N. J., to points in New Jersey and New York, those in Connecticut west of the Connecticut River, and those in Pennsylvania on the east of U. S. Highway 15.

No. MC-93207 (Sub-No. 6), dated March 30, 1948.

Coal tar, coal tar distillates and residue, alphalt, and asphaltic admixtures, in bulk, in tank trucks, over irregular routes,

From Philadelphia, Pa., and points within 15 miles of Philadelphia, to points in New Jersey, New York, those in Connecticut west of the Connecticut River, and those in Maryland, and Delaware within 100 miles of Philadelphia;

From points in New York, those in Connecticut west of the Connecticut River, and those in Pennsylvania on and east of U. S. Highway 15, to points in Hudson, Union, Somerset, Middlesex, Bergen and Passaic Counties, N. J.;

From Bethlehem, Pa., to points in New Jersey; and

From points in Connecticut west of the Connecticut River to points and places in New York.

APPENDIX C

Order of the Interstate Commerce Commission

At a session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 18th day of December, A.D. 1961.

No. MC-93207 (Sub-No. 9)

TAR ASPHALT TRUCKING COMPANY, INC.,

CONVERSION PROCEEDING

It appearing, That on June 13, 1961, the Commission, division 1, made and filed its report and order in the above-entitled proceeding;

It further appearing, That upon consideration of the record, by order entered November 8, 1961, the proceeding was reopened on our own motion for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, divisional, on the date hereof has made and filed a report on reconsideration, containing its findings of fact and conclusions thereon, which report and the said report of June 13, 1961, are hereby referred to and made a part hereof;

It is ordered, That the said order of June 13, 1961, be and it is hereby, vacated and set aside.

It is further ordered, That respondent shall and it is hereby required to effect compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Com-

merce Act within 150 days of the date of service of this order, unless such time be further extended; that upon such compliance, the certificate granted be issued promptly; and that concurrently with the issuance of the certificate the permits presently held by respondent shall be revoked as provided in said report.

And it is further ordered, That if respondent fails to effect compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within the time specified herein, the permits presently held by respondent be, and they are hereby, revoked pursuant to the provisions of section 212(c) of the Interstate Commerce Act.

By the Commission, division 1.

HAROLD D. McCOY
Secretary.

(SEAL)

APPENDIX D

Section 203 (a) (15) Interstate Commerce Act [49 U. S. C. §303 (a) (15)]

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers of property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (2) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

APPENDIX E

Section 212 (c), Interstate Commerce Act [49 U. S. C. §312 (c)]

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

APPENDIX F

1957 Amendment to Section 209 (b) Interstate Commerce Act [49 U. S. C. 309 (b)]

SEC. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209 (b) (49 U. S. C. 309 (b)) a new sentence to read as follows: "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and or its shipper and the changing character of that shipper's requirements."; and (2) by changing the third sentence of section 209 (b) (49 U. S. C. 309 (b)) to read as follows: "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and

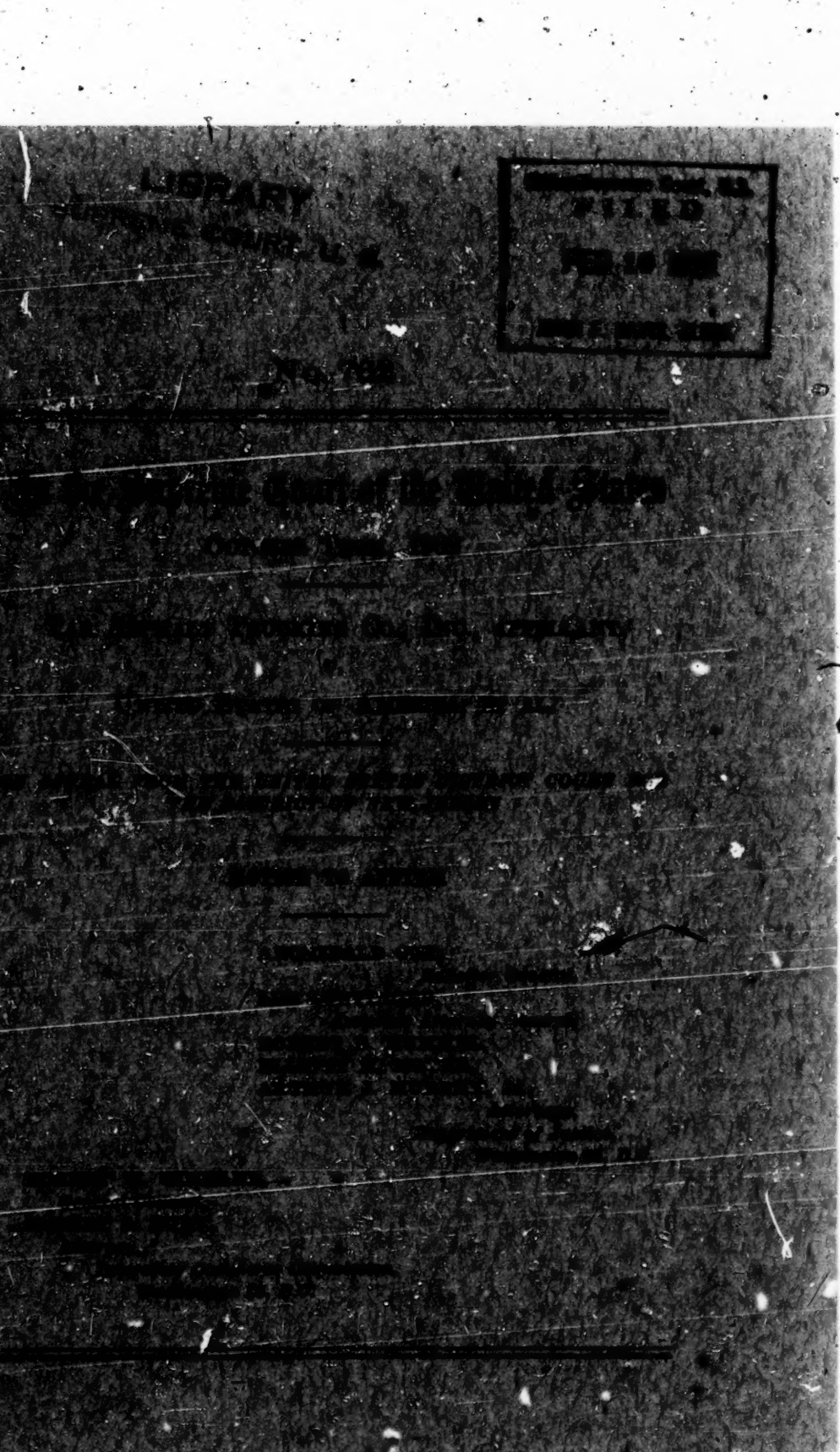
facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."

Approved August 22, 1957.

APPENDIX G

Section 203 (a) (14) Interstate Commerce Act
[49 U. S. C. 303 (a) (14)]

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be and shall be regulated as transportation subject to Chapter 1 of this title.



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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court, which dismissed appellant's complaint seeking to set aside an order (J.S. 17a) of the Interstate Commerce Commission. The Commission's order, issued under Section 212(c) of the Interstate Commerce Act, converted appellant's operating authority from that of a contract to a common motor carrier. Appellant's contract carrier operations were conducted under two permits issued in 1946 and 1948, which provided "relatively narrow territorial and

commodity authority" (J.S. 13a). The commodity authority was limited to bulk shipments of coal tar, coal tar distillates and residue, asphalt and asphaltic admixtures (J.S. 15a–16a). Appellant has operated mostly by tank truck (J.S. 7).

Section 212(c), under which the Commission acted, was part of the 1957 amendments of the Act. This legislation amended the definition of "contract carrier" in Section 203(a)(15) to limit such carriers to those operating under continuing contracts with one person or a limited number of persons, for the furnishing of transportation services either (a) "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served" or (b) "designed to meet the distinct need of each individual customer."[1] Section 212(c) provides for the revocation of the contract carrier permit of, and the issuance of a common carrier certificate to, any permit holder whose operations on the effective date of

[1] The changes in the definition of a contract carrier were as follows (previous wording omitted by the amendment in brackets and new matter in italics):

"(15) The term "contract carrier by motor vehicle" means any person which [, under individual contracts or agreements,] engages in [the] transportation [(other than transportation referred to in paragraph (14) of this section and the exception therein)] by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (*other than transportation referred to in paragraph (14) and the exception therein*), *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*"

the Act (August 22, 1957) did not conform to the amended definition of contract carriage, were those of a common carrier, and were otherwise lawful. It further provides that the certificate thus issued "shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

In January 1958, the Commission instituted a proceeding under Section 212(c) to determine whether appellant's contract carrier permits should be revoked and a common carrier certificate issued in lieu thereof. After full administrative proceedings, the Commission, in its report on reconsideration, concluded, in the terms of the statute (J.S. 14a):

> [T]hat the operations of respondent on August 22, 1957, did not and presently do not conform to the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act, as amended; that such operations are those of a common carrier by motor vehicle and are otherwise lawful.

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[2] The 1957 legislation also amended Section 209(b) of the Act to enlarge the Commission's authority to secure compliance by nonconverted and new contract carriers with the revised definition of contract carrier (see discussion, *infra*, pp. 6–7). The second proviso of Section 209(b) is:

"*Provided further*, that no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."

The Commission's order revoked appellant's contract carrier permits and provided for the issuance of a substitute common carrier certificate. The certificate prohibited appellant from "tacking," that is, from combining its separate geographical operating authorities in the certificate to provide a through service it could not have provided under its permits.[3]

The Commission found that appellant was not contracting with "a limited number of persons" but was holding "itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority" (J.S. 13a). The Commission ruled that in such circumstances appellant's contracts with 19 individual shippers did not satisfy the statutory definition of contract carriage in Section 203(a)(15) that such carrier serve only a "limited number of persons," but, rather, were characteristic of the operations of a common carrier (J.S. 14a). The Commission held that appellant had not dedicated vehicles "for a continuing period of time for the exclusive use of each person served," with the "possible exception" of two tank trailers which were "apparently * * * set aside for the convenience of respondent" (J.S. 13a).[4] It also found that appellant was

[3] Contract carriers, unlike common carriers, have never been permitted to tack or join separate segments of their operating authorities at common service points in order to perform a through service. See *T. T. Brooks Trucking Co., Inc., Conversion Application, supra*, 81 M.C.C. 561, 572.

[4] Both of these trailers were set aside because of particular characteristics of the product to be transported. One tank trailer was reserved to avoid the necessity of cleaning the tank after each shipment and the other because the product required transport at high temperature (J.S. 11a). Both trailers could

not furnishing "a transportation service designed to meet the distinct need of each individual customer" (J.S. 13a), and that appellant's use of heating units and pumps with extra long hoses was not indicative of a distinctive or specialized service (J.S. 13a).

The district court, after a careful review of the evidence (J.S. 5a–7a), unanimously concluded that the Commission's findings that appellant did not meet the definition of contract carrier under the 1957 amendments were supported by substantial evidence (J.S. 3a–9a) and that its order was "within the scope of the Commission's statutory authority" (J.S. 9a). The court noted, among other things, that there was testimony that appellant had entered into at least 50 contracts since the effective date of the Act and that it "will enter into a transportation contract with any shipper" upon agreeable terms (J.S. 5a, 7a); that appellant allocated its equipment "as orders [came] in, and then only for the period of the particular order or job" (J.S. 5a); and that appellant operated special equipment not because of the distinct needs of particular shippers, but because of the characteristics of the commodities it transported (J.S. 5a–6a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

1. Appellant argues at length (J.S. 3–4, 12–17) that the evidence not only does not support the Commission's findings, but actually calls for a contrary conclusion. The court below, however, reviewed the

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be, and were, used to transport products for various shippers (J.S. 5a–6a).

evidence at length (J.S. 5a–7a), and concluded that the findings were adequately supported in the record. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

2. A related argument is appellant's contention that the Commission improperly placed upon it the burden of proving that it was a contract carrier. The Commission's decision, however, does not rest on any failure of appellant to sustain its burden of proof, but on the fact that all the evidence in the record, including that presented by appellant, established that appellant was not a contract carrier under the amended definition. The argument is thus nothing more than a restatement of the contention that the Commission's findings are unsupported by substantial evidence—a contention properly rejected by the court below.

3. Appellant argues (J.S. 5, 17, 18–20) that the Commission improperly relied upon the number of its contracts as a basis for concluding that appellant was engaging in common carriage. It stresses the proviso in Section 209(b) which prohibits the Commission from limiting the number of contracts a contract carrier may have.

That prohibition, however, is expressly inapplicable if the Commission finds that the scope of the carrier's additional operations is not confined to those of a con-

tract carrier under the amended definition. Furthermore, one of the terms of the amended definition is that the carrier have contracts with only a "limited number of persons." Finally, as this Court recently pointed out (*Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 85–87), the amended definition of contract carrier "changed the result of our decision in *United States* v. *Contract Steel Carriers*," 350 U.S. 409, that "a contract carrier, rendering a specialized service in the sense that it hauled only a limited group of commodities over irregular routes, did not become a common carrier because it reached for new business within the limits of its license." In short, as the Commission correctly held (J.S. 13a, 14a), the number of a carrier's contracts, while not conclusively determinative of its status, is plainly both a relevant and an important factor in deciding whether a carrier "holds itself out to serve the general public" and is thus a common carrier.

4. Finally, appellant argues (J.S. 21–23) that the Commission improperly included in the certificate a prohibition against "tacking," that is, joining separate operating authorities in order to perform a through service. The argument is that common carriers other than contract carriers whose permits have been converted to certificates under Section 212(c) are permitted to tack, and that since Congress did not change the definition of common carrier, it intended converted contract carriers to have the same tacking rights as other common carriers.

The argument rests upon a misconception. All common carriers do not have the right to tack, and "Restrictions against tacking are not uncommon in certificates issued by us in proceedings involving proof of public convenience and necessity" (*T. T. Brooks Trucking Co., Inc., conversion application, supra,* 81 M.C.C. at 572). The Commission has historically and repeatedly imposed such restrictions.[5] In the present case, the prohibition against tacking was fully justified in order to implement the requirement in Section 212(c) that the certificate of a converted contract carrier "shall authorize the transportation * * * of the same commodities between the same points or within the same territory as authorized in the permit." As the Commission explained in the *Brooks* case, *supra,* at p. 572, in imposing a similar prohibition on tacking: "[T]o authorize a converted carrier to perform a through service over a combination of its present routes would be akin to authorizing the transportation, as a common carrier, of traffic between points or territories not previously authorized by that carrier's permits. Such a result would be contrary to the wording of the statute * * *."[6]

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[5] *Coastal Tank Lines, Inc., Extension—Delaware City,* 73 M.C.C. 189; *John E. Muth Extension, Kentucky to Eastern States,* 69 M.C.C. 187; *Delcher Bros. Storage Co., Extension—California,* 68 M.C.C. 51; *Direct Transport Co. of Kentucky, Inc., Extension,* 68 M.C.C. 151; *Transport Co. of Virginia Extension,* 43 M.C.C. 716; *Zirbel—Investigation of Operations,* 53 M.C.C. 684.

[6] Since the Commission's prohibition on tacking is justified by its statutory authority to limit the carrier to the same points and territories authorized by the permit, there is no occasion here to consider the alternative ground upon which

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1963.

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the district court upheld the restriction, namely, that it is justified "to maintain substantial parity with the operating authority contained in Tar Asphalt's contract carrier permits" (J.S. 7a). The question whether, in order to achieve "substantial parity" between a converted carrier's permit and certificate, the Commission may limit the certificate authority to movements from, to or between facilities of particular types of businesses, is presented in the government's appeal in *United States* v. *J. B. Montgomery, Inc.*, pending on Jurisdictional Statement, No. 791, this Term.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA,

Appellees.

On Appeal from United States District Court
for the District of New Jersey

REPLY BRIEF AND APPENDIX FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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TAR ASPHALT TRUCKING CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA,

Appellees.

On Appeal from United States District Court for the District of New Jersey

(On Motion to Affirm)

REPLY BRIEF FOR APPELLANT

Counter-Statement

In the Commission report of December 18, 1961 the scope of appellant's authority under its two permits is described as "relatively narrow territorial and commodity authority" (J.S. 13a).

From a reference to the authorities in J.S. 15a-16a; it appears that its territory extends from the Canadian border in New York on the north to points in Maryland and Delaware, 100 miles south of Philadelphia, Pa. on the south and from the Susquehanna River in Pennsylvania on the west to the Connecticut River in Connecticut on the East, an area of roughly 110,000 sq. miles.

ARGUMENT

I.

The appellees have not directly responded to the point raised by appellant in its Jurisdictional Statement whether the lower court was correct in holding that the 1957 amendment overruled the Supreme Court's decision in the *Contract Steel Carriers* case (350 U. S. 469) or whether that decision is still the law as far as existing contract carriers are concerned.

In their argument under Point 3 of their brief (p. 7) however, appellees refer to the holding of this Court in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U. S. 81, 85-87, that the amended definition of contract carrier "changed the result of our decision in the case of *United States* v. *Contract Steel Carriers* (*supra*).

It did change the result as far as new contract carrier applications were concerned. The application in J-T Transport Co. was for new contract carrier authority and this Court's holding in that case resolved that the amended definition did change the result of its decision in *U. S.* v. *Contract Steel Carriers* in the case before it. It did not hold that the 1957 Amendment overruled the decision of the Supreme Court in the *Contract Steel Carriers* case as far as existing contract carriers are concerned.

II

In the argument under Point I of their brief, appellees urge that the court below reviewed the evidence at length and concluded that the findings were adequately supported in the record and that under the rule established in *Radio Corporation of America* v. *United States*, 341 U. S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 490-491 and *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536, there is no occasion for further review of these factual issues.

If this was a situation were conflicting evidence was introduced or one where conflicting inferences could be drawn from the unconverted evidence admitted, it would be the Commission's proper function to resolve the disputed questions of fact or the conflicting inferences and if there was substantial evidence in the record as a whole to support its findings, they would not be subject to revision by a reviewing court. But such is not the case.

This Court laid down the standard to be applied in all instances of court review of agency decisions in the case of *Universal Camera Corp.* v. *National Labor Relations Board*, *supra*, where it held at page 477:

> "The Wagner Act provided 'The finding of the Board as to the facts, if supported by evidence, shall be conclusive': Act of July 5, 1935, Sec. 10 (e), 49 Stat. 449, 454, 29 U. S. C. Sec. 160 (e). This Court read 'evidence' to mean 'substantial evidence'; Washington, V & M Coach Co. v. Labor Board, 301 U. S. 142 and we said that '(s)ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229.

> Accordingly, it must do more than create a suspicion of the existence of the fact to be established. * * * it must be enough to justify if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300."

In the same case this Court also set forth the limitations that should govern the exercise of its power to review the correctness of the application of the foregoing standards by a reviewing court. That rule has lately been reaffirmed in the case of *Federal Trade Commission* v. *Standard Oil Co.*, 1958, 355 U. S. 396, at 400-401 in these words.

> "Moreover in Universal Camera Corp v. National Labor Relations Board (giving the citations), we decided that substantially of evidence on the record as a whole to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied. We do no more on the issue of insubstantiality than to decide that the Court of Appeals has made a 'fair assessment' of the record."[1]

It is most difficult to urge upon this Court that one's particular case is one of the rare instances referred to in the foregoing rule and to suggest that the reviewing court has "misapprehended" the standard or has misapplied it.

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[1] The Court in a footnote cited *National Labor Relations Board* v. *Pittsburg S.S. Co.*, 340 U. S. 498, 502-503 (1951); *National Labor Relations Board* v. *American Natl. Insurance Co.*, 343 U. S. 395, 409-410 (1952).

But this must be urged here. It must be urged that the District Court, in reviewing the record and finding that there was substantial evidence on the whole record to support the findings and conclusions of the Commission misapprehended the standard to be applied, as laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board, supra*, and that the District Court made such finding without any basis in the evidence for it and that it did not make a "fair assessment" of the evidence in the record.

The Commission found, and the District Court found that there was substantial evidence in the record to support it, that appellant's operations were not those of a contract carrier within the amended definition of the Act on the effective date of the amendment and in the three years following, in that appellant does not assign vehicles for a continuing period of time to the exclusive use of each person served and that the evidence failed to establish that it furnishes a transporation service designed to meet the distinct need of each individual customer.

The Commission further found, and the District Court found that there was substantial evidence in the record to support it, that appellant's operations were those of a common carrier in that the evidence was convincing that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority, and under the circumstance respondents contracts with 19 individual shippers cannot be regarded as contracts with a "limited number of persons" within the meaning of section 203 (a) (15) of the act but must be regarded as a holding out of service to the general public within the meaning of section 203 (a) (14) (defining common carriers).

(a)

As set forth in the Jurisdictional Statement (pp. 12, 13a) the Commission did find from the evidence that appellant did set aside two tank trailers for the exclusive use of two shippers but because it further found that the setting aside of the equipment was for the convenience of appellant and not of the shippers it ignored this evidence and notwithstanding it, made the finding that appellant did not assign vehicles for a continuing period of time to the exclusive use of each person served. The District Court adopted the Commission's version and likewise found that appellant did not assign vehicles for a continuing period of time for the exclusive use of each person served (J.S. 6a). This finding is contrary to the evidence in the record.

(b)

As set forth in the Jurisdictional Statement, page 13, under heading "b", the evidence in the record shows that in 1932, before the effective date of the Motor Carriers Act, in 1937, appellant acting under individual contracts, fashioned a tailor-made service to meet the needs of shippers in the area who had need to have asphalt products delivered to them throughout the year in liquid form, including the winter months by installing a heating unit under tanks mounted on a truck. There can be little doubt at the time appellant built this equipment and commenced to render this service to the shippers who had need of it, it was furnishing a specialized service to meet the distinct need of each individual shipper and this service which was specialized and tailor-made at its inception was the service which the evidence in the record shows appellant continued to furnish to meet the distinct need of its individual shippers right down to the hearing before the Examiner on December 1, 1960. It was specialized when it was inaugurated. It did not cease to be with the passage of time.

And so with the remainder of the evidence in the record, referred to in J.S. p. 13, of the development of insulated tank trucks to meet the distinct need of several of appellant's shippers to have temperature of product maintained throughout transit; the installation of pumps in certain of the equipment to meet the distinct need of several of appellant's shippers to have high density material delivered to them for use in their businesses; the application of auxiliary portable burners to meet the distinct need of one of appellant's shippers to have a constant high temperature of product maintained during transportation; the furnishing of barrelling and weighing of product on delivery to meet the distinct need of one shipper for this service; the furnishing of a long hose and pump service to effect delivery to a shipper of his product whose receptacles were a substantial distance from the highway and who had a distinct need for this service; making pick-ups of cargo at refinery at a specified time and delivery at plant at a specified time to meet the distinct need of one shipper for this specialized service; the delivery to daily progressing job sites during course of road construction to meet the distinct need of three of appellant's road constructor customers for this specialized service; and in addition, drivers experienced in the inherent qualities and characteristics of the different type of products transported for each of the customers served.

The development of insulated tanks, the installation of pumps, the application of auxiliary portable burners to maintain high temperatures were specialized and tailor-made services at their inception. The evidence in the record shows appellant continued to furnish them down to the date of the hearing on December 1, 1960. They were specialized when inaugurated; they did not cease to be with the passage of time. Besides these, the evidence referred to above discloses seven separate additional types of spe-

cialized service to meet distinct needs of different customers of appellant, making ten in all, in addition to furnishing delivery throughout the year of asphaltic products in liquid form and the employment of drivers experienced in the different products. The appellant had but 19 effective contracts in all (183a) of which two were serviced by the assignment of vehicles for a continuing period of time to their exclusive use, leaving 17 remaining. One contract was made in 1937 and five in 1941 and are still being served. The specialified service that these shippers were receiving to meet their distinct needs at the time the contracts were entered into has not ceased to be so by the passage of time. To find, as the Commission did that the appellant did not furnish a service to meet the distinct need of each individual customer, requires the above evidence to be ignored or the "needs of the shippers to be held as not "distinct".

As was held by the District Court in *I. T. Transport Co. v. U. S.*, 185 F. Supp. 838, and affirmed by this Court in 368 U. S. 81, "Under the statute a shipper is entitled to have his distinct needs met."

(c)

As to the Commission's holding that the appellant's operations were those of a common carrier in that the evidence was convincing that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority, appellant has included herein as Appendix I, the whole of the testimony of the appellant's witness on this point.

This, together with the fact found by the Commission that there were 19 effective contracts during the whole of the three critical years (Commission Report, Dec. 18, 1961, J.S. 11a) furnishes no support in the record for the finding that appellant's operations were those of a common carrier through holding out.

III

In its argument under Point 3 of its brief, the government urges that the prohibition contained in Section 209 (b) (against limiting the number of contracts that an *existing* contract carrier may have) is expressly inapplicable if the Commission finds that the scope of the carriers additional operations is not confined to those of a contract carrier under the amended definition.

This argument is without any force here, because the Commission could not and did not find that there were any additional operations or additional contracts.

Where there are no additional operations the Commission cannot limit the number of contracts an *existing* contract carrier may have because Congress itself has denied this power to the Commission by the proviso in Sec. 209 (b) of the Act (J.S. 21a-22a).

It follows that since the Commission cannot limit the number of contracts an existing contract carrier can have where he has not added contracts, the Commission cannot legally consider the "number" of contracts an existing contract carrier had on the effective date of the amendment (Aug. 22, 1957) as part of its determination whether the *existing* contract carrier has contracts with a "limited number of persons".

If the Commission possessed this claimed power it could render nugatory Congress' own prohibition in the proviso of Sec. 209(b), against limitation of contracts of *existing* contract carriers who have not added any contracts. The Commission is still left free to consider the scope of a contract carrier's *additional operations*, if contracts *are* added, and likewise free to consider if the additional contracts, plus the contracts existing on the effective date of the amendment, are contracts with a "limited number of persons" within the meaning of Sec. 203-(a) (15) of the Act.

It does not have this power where no contracts are added by an *existing* contract carrier to the number of contracts held on the effective date of the amendment.

IV

(a)

The government in its argument under Point 4 of its brief urges that all common carriers do not have the right to "tack" and cites six cases as examples where "no-tacking restrictions were imposed in common carrier certificates under footnote "6" at page 8 of its brief.

It is true that in applications for additional common carrier authority under Section 207, where there must be a showing of public convenience and necessity for the service to be authorized, "no-tacking" restrictions are sometimes imposed in the new authority granted to the common carrier, but in the limited situations where there has been either no showing of need for the proposed service to other areas and the grant, without the restriction would authorize services through tacking to other areas without a showing of public convenience and necessity for them; or alternatively at times to protect existing common carriers from competition where no competition is shown to be required by the public convenience and necessity.

It was where a new grant of operating authority was made under Sec. 207 that a limitation on its use by a no-tacking restriction was imposed in the cases cited in the appellee's brief. By virtue of Sec. 208 the Commission is authorized to do this in Sec. 207 cases.

A reference to the six cases makes this clear.

In *Transport Co. of Virginia Extension*, 43 M. C. C. 716, tacking was allowed the carrier though cited as an example where a "no-tacking" restriction was imposed.

In *Zerbel, Investigation of Operations*, 53 M. C. C. 684, tacking of operations authorized in two separate paragraphs of the one certificate was denied. Tacking of authorities appearing in two separate certificates held by the carrier was allowed. In *Delaher Bros. Storage Co., Extension, California*, 68 M. C. C. 51, tacking was denied to protect existing protesting common carriers.

In *Direct Transport Co. of Kentucky, Inc., Extension*, 68 M. C. C. 151 the Commission imposed a restriction against joinder in the grant because there had been no showing of the need for transportation service apart from Doe Run, Indiana and Louisville, Kentucky.

In *John L. Muth Extension, Kentucky to Eastern States*, 69 M. C. C. 187, a restraint against tacking was imposed because the carrier failed to establish a need for any service between states he was then serving under previous authorities and the states he would be permitted to serve under the additional authority applied for.

In *Coastal Tank Lines, Inc., Extension—Delaware City*, 73 M. C. C. 189, a restriction was imposed against tacking in the certificates of three different applicants because the Commission held that to permit the carriers to join their existing authority with that being granted, would in effect authorize the carriers to perform completely new service.

Even though restrictions against tacking have been imposed in some of the cases cited (new grants of authority under Sec. 207 applications) the long standing policy of the Commission has been to generally permit tacking of common carrier authorities unless there is some valid reason for restricting it. As late as August 22, 1962, the Commission in *Colonial Refrigerated Transportation, Inc., Extension—Frozen Cooked Vegetables* No. M. C. C. 115841 (Sub No. 86) expressed its position as follows:

"It is not our policy to impose no-tacking restrictions on grants of common carrier authority in the absence of some compelling reasons therefor. No such showing has been made here, and, accordingly, we conclude that no restrictions will be imposed on our grant of authority hereinafter set forth."

By the above standard a no-tacking restriction, in the absence of compelling reasons is not ordinarily consistent with common carrier status. The imposition of no-tacking restrictions in all converted common carrier certificates would thus discriminate against the converted common carrier and in favor of the regular common carrier.

(b)

The government argues in its brief under Point 5 in support of the motion to affirm, that the Commission's prohibition on tacking is justified by its statutory authority to limit the carrier to the same points and territories authorized by the permit.

It is grounded on the premise that there is statutory authority for its action when in fact there is a complete absence of statutory authority for such action. The statutory reference employed by the Commission is that appearing in Sec. 212 (c):

"Such certificate so issued shall authorize the transportation as a common carrier of the same commodities between the same points or within the same territory as authorized in the permit."

Everything the Commission says in the case of *T. T. Brooks Trucking Co., Conversion Application* 81 M. C. C. 561 is appropriate to the status of the carrier as a contract carrier. Nothing it says has any application to the status of the converted carrier as a common carrier.

The statute itself (212(c)) does not say there shall be no tacking of separate grants of authority and the only support for the Commission's unanimous restriction against tacking in all contract carrier conversion proceedings must be found in the Commission's interpretation of its duty under the last sentence of 212(c) quoted above.

But does a reading of this sentence require or even justify a conclusion that there shall be no tacking in the converted common carrier's certificate.

The legislative history of the Act is referred to in *J. B. Montgomery, Inc.* v. *United States*, 266 F. Supp. 455:

> "This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him a greater opportunity. 'He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation.'"

(c)

To reach its conclusion that there shall be no tacking allowed to the converted common carrier the Commission is forced to introduce its own interpretation that Congress intended by the words used; a substantial parity between the operations of the carrier as a contract carrier and the operations to be performed by the carrier as a common carrier.

The only way that the Commission can logically adopt this concept in a conversion proceeding is to presuppose

or presume that Congress did not know that tacking was denied to contract carriers but tacking was generally allow to contract carriers. This presumption is unwarranted.

As was said in *J. B. Montgomery, Inc. v. United States*, 206 F. Supp. 455 (now pending before the court on Jurisdictional Statement, No. 791 this term):

> "There is nothing in the Act or its legislative history indicating that Congress intended to restrict this enlargement of operations by the test of 'substantial parity' or otherwise.
>
> "Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish 'substantial parity' between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history."

CONCLUSION

The questions presented are substantial and justify plenary consideration for their resolution.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Counsel for Appellant.

APPENDIX I

Excerpts from Hearing before the Interstate Commerce Commission

U. S. Custom House Building,
Second and Chestnut Streets,
Philadelphia, Pennsylvania,
Thursday, December 1, 1960.

Met for reopened hearing, pursuant to notice, at 9:30 a.m.

Before:

SAMUEL C. SHOUP, Examiner.

Appearances:

JOHN J. CORCORAN, JR., 64 Boyd Avenue, Jersey City, New Jersey, appearing for Tar Asphalt Trucking Company, Inc., Respondent.

ARTHUR S. COPCUTT was sworn and testified as follows:

(commencing at 16-19)

Exam. Shoup: Mr. Copcutt, who in your organization procures the additional contracts when that becomes necessary?

The Witness: Mr. Anthony Santaniello, or by his direction.

Exam. Shoup: That is the President of your corporation?

The Witness: That's correct. Or by his direction.

Exam. Shoup: And how does he go about procuring an additional customer?

The Witness: Well, if they call in requesting our (17)* specialized service—let's say it's a manufacturer and he has an amount of transporation of a certain commodity to be taken care of; he calls in and we know some of the key questions to ask him which Mr. Anthony Santaniello has requested if any call is made in to get this information. For instance, the quantity—the estimated quantity for the year or for how many years they anticipate that they might want this service; whether it's constant, by the day, by the month, by the week; whether it's seasonal, and any other important particulars which he can—which he might have need of in order to discuss it.

Then he goes over there and discusses it with them or discusses it by phone and any other means that he has of contacting them, and he gives us the order to type up the contract and then we mail it all over, or he brings it over or he has someone bring it over for signature.

(commencing at 19-13)

Exam. Shoup: Excuse me.

Does your company accept business from any and all persons who desire the transporation of products which you are authorized to transport?

The Witness: Do they—

Exam. Shoup: Provide service for any and all persons who want the transportation of the products which you transport?

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Appendix I

The Witness: Well, I turn them over to Anthony J. Santaniello. It is at his disposition whether they are accepted or not. If they meet the terms of the contracts, or if he meets the terms of the contract, or it is agreed between the two parties.

Exam. Shoup: Well, if you had fifty new customers today who wanted to engage your service would your company perform service (20) for an additional 100 shippers?

The Witness: I couldn't answer that, because A. J. is the man that handles that. I just take the message and order and relay it to him and he has to make the disposition on that.

Mr. Corcoran: I might make this suggestion, if it will help clarify the situation.

Whether they would or would not perform the service for any single person who called in would depend solely and wholly on the fact of whether they could come to agreeable terms between them. If they could not, they would not enter into an agreement. If they could, they would.

The Witness: That is what happens.

Mr. Corcoran: There are companies coming in for new business but they are not always able to come to terms because of the specialized nature of the service, the distance that their products may have to be transported within the area permitted by the rights, and because of the varying demands or the intervals that may exist between the demands of the customer for the service that he may want. He may want—let me—this I will put on the record as some sort of an analogy.

He may want transportation from a point in Delaware, or a point in the western part of Pennsylvania to a point almost towards Connecticut; and he may only want that operation on one particular day. That would require the

movement of the equipment to the point where it would be loaded, the movement of it (21) from Jersey City to this particular point, maybe towards the Susquehanna River in Pennsylvania, empty, and then coming back from a point like Middletown, Connecticut, empty. Such an operation would ordinarily be one that wouldn't be very attractive to the company, but if the customer was willing to enter into an arrangement that would take into consideration the truck going back and—going first to be loaded empty a distance of maybe 200 miles and coming back a distance again of maybe 90 miles empty and was willing to allow for that, then they would be willing to do it, but—

The Witness: Compensation—

Mr. Corcoran: But most often there is other kinds of service that would suit the customer better and after their discussion with Mr. Santaniello they wouldn't come to an agreement. And it wouldn't be because we would not want to take it, but because each contract calls for a specialized treatment, a specialized agreement. There is no fixed schedule of rates.

APPENDIX J

TAR ASPHALT TRUCKING CO.

SCHEDULE OF CONTRACTS WITH SHIPPERS FOR WHOM INTERSTATE CONTRACT CARRIER SERVICE HAS BEEN PERFORMED WITHIN THE LAST THREE YEARS.

American Bitumuls & Asphalt Company—Entered into April 3, 1952.

The Barrett Division, Allied Chemical & Dye Corporation—Entered into June 11, 1945 and as amended Dec. 5, 1945, Dec. 1, 1947, Jan. 22, 1948.

Cities Service Oil Co.—Entered into Mar. 12, 1941.

The Flinkote Company—Entered into Sept. 30, 1948.

Koppers Co.—Entered into June 22, 1937; Feb. 1, 1948 Add 1-14.

William V. Mack Company—Entered into Jan. 1, 1952.

W. L. Mason Company—Entered into Oct. 29, 1947.

Raybestos Division—Entered into Jan. 21, 1953.

Socony-Vacuum (Standard Oil of N. Y.)—Entered into June 30, 1951.

Standard Bithulitic Co.—Entered into April 4, 1941.

Standard Oil Co. (N. J.)—Entered into Nov. 1, 1950.

Sun Chemical (A. C. Horn)—Entered into—not dated—Add. Mar. 26, 1956 and Jan. 1, 1957.

The Texas Company—Entered into Mar. 25, 1941.

The Barber Company—Entered into Mar. 17, 1941.

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Brookhaven Asphalt Co.—Entered into Jan. 1, 1952, Add 1-1-57, Add. 3-1-58.

Metropolitan Roofing & Supply Co.—Entered into Mar. 21, 1941.

National Waterproofing Papers, Inc.—Entered into—not dated, Add. 1-1-51; Add. 1-1-57; Add. 3-1-58.

Ernest Zobel & Co.—Entered into Jan. 1, 1952.

Del-Val Asphalt Corp.—Entered into, contract undated.